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No. 03-453

Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANKLIN D. VIPPERMAN,

Petitioner,

vs.

CARLOS CONCHA; JOHN COMPSTON; CHUCK GATES; JEFFREY JEANQUART; and NEVADA DIVISION OF PAROLE AND PROBATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 AGAINST THE NEVADA DIVISION OF PAROLE AND PROBATION AND AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY THE ELEVENTH AMENDMENT.

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES WERE PROPERLY DISMISSED BECAUSE THE APPLICABLE STATUTES OF LIMITATIONS HAVING EXPIRED.

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 WERE PROPERLY DISMISSED FOR HIS FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND THE PROPER APPLICATION OF HECK V. HUMPHREY, 512 U.S. 477, 486-487 (1994).

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OPINIONS BELOW

The opinions of the court of appeals and of the District Court are unreported but have been included in Petitioner's Appendix ("App.").

STATEMENT OF THE CASE

Franklin D. Vipperman (hereinafter "Vipperman") filed a complaint, on November 13, 2000, against the Respondents Nevada Division of Parole and Probation ("NDOPP"), John Compton ("Compton"), Carlos Concha ("Concha"), Jeffrey Jeanquart ("Jeanquart") and Chuck Gates ("Gates") resulting in the docketing of United States District Court, District of Nevada, Case No.: CV-S-00-1355. Vipperman's complaint alleged civil rights violations under 42 USC §§ 1983, 1985 and 1986; violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970; and violations of his First, Fifth, Sixth and Fourteenth Amendment rights. ER 1.

Vipperman filed his action in proper person. His complaint is conclusory and only vaguely describes facts in support of his contentions. ER 1-15. The complaint asserts four (4) causes of action. ER 1-15. The first claim appears to assert that Respondent NDOPP conspired with certain individuals, including former federal judge Harry Claiborne, "to keep Plaintiff [Vipperman] in prison for the rest of his life." ER 7. The second claim appears to challenge Respondent NDOPP's decision not to "modify" Vipperman's sentence after he served (10) years of his parole, and complains of a parole violation charge filed on August 8, 1997. ER 9-10. The third claim in Vipperman's complaint

challenges the denial of his request to be released from parole despite his presenting to Respondent Gates,

> . . . documentary evidence, which unequivocally proved that Plaintiff had been framed for murder by Police and Prosecutors, railroaded through two different trials by a trial judge, and sold out by his alleged defense attorney at trial, and on Appeals. And further kept in Prison through a conspiracy between the Parole Board, Police, Prosecutors, alleged Defense Attorneys, and Trial Judge. ER 11.

Vipperman further claims Respondent Jeanquart allegedly informed him that Respondent Concha had denied Petitioner's request for release from parole. ER 11. Vipperman's fourth claim, the most vague of the four causes of action, appears to assert that Respondent NDOPP's file related to him contains false information which he has been unable to rebut. ER 12-13.

Vipperman's complaint sought a declaratory judgment that his rights had been violated and injunctive relief barring Respondents from harassing him during the pendency of the action. ER 14. The complaint also prayed for relief in the form of an "honorable discharge" from parole. ER 14. Lastly, Vipperman sought fifty million dollars in compensatory and punitive damages. ER 14.

On March 5, 2001, Vipperman filed a "Petition to Revisit and Reconsider Plaintiff/Petitioner's Petition for a Writ of Habeas Corpus" in his instant civil rights action. ER 166-172. On April 12, 2001, the District Court entered an Order denying Vipperman's Petition. ER 658-659. The District Court concluded the court's jurisdiction over the section 1983 suit did not vest the Court with authority to review rulings issued in previous lawsuits or petitions

filed by Vipperman challenging his underlying conviction. ER 659. The court advised Vipperman that it was unlikely he could file a timely motion for reconsideration of his Petition for Writ of Habeas Corpus, filed on March 10, 1986, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which requires that motions for reconsideration be filed within one year after the judgment or order was issued. ER 659.

On March 8, 2001, Respondent NDOPP filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). ER 161-165. Vipperman filed an opposition to this motion to dismiss. ER 578-588. On April 17, 2001, the District Court entered its Order granting Respondent NDOPP's motion to dismiss on Eleventh Amendment immunity grounds. ER 662-667.

Because Vipperman failed to state a claim upon which relief could be granted, Respondents Compton, Jeanquart and Concha also filed motions to dismiss. ER 702-708 and 718-724. Vipperman filed oppositions to Respondents' motions to dismiss. ER 709-717 and 725-733. On December 19, 2002, the District Court entered its Order granting these motions to dismiss on grounds that Respondents Compton, Jeanquart and Concha were immune from suit in their official capacities and because Vipperman failed to state a claim upon which relief could be granted. ER 734-740.

Respondent Gates filed a motion to dismiss based on Vipperman's failure to state a claim. ER 742-748. Vipperman filed an opposition to this motion to dismiss. ER 749-761. On February 21, 2003, the District Court entered its Order granting Respondent Gates' motion to dismiss based on grounds that he was immune from suit in his official capacity and because Vipperman failed to state a claim upon which relief could be granted. ER 767-773.

On March 5, 2003, Vipperman filed a Notice of Appeal resulting in the docketing of Case No. 03-15416 in the Ninth Circuit Court of Appeal. Upon the completion of briefing, the Ninth Circuit, on July 25, 2003, issued its Memorandum Decision. Therein the court affirmed the District Court's decisions and held:

> Vipperman's claims against NDOPP and his monetary claims against the individual defendants sued in their official capacities are barred by the Eleventh Amendment.
>
> As for the individual defendants sued in their individual capacities, [for] parole decisions in 1981 and 1997 . . . [t]he civil rights statutes can provide Vipperman with no relief because the applicable statutes of limitations have expired.
>
> Vipperman cannot use the civil rights statutes to challenge the NDOPP's failure to modify his life sentence after he served ten years on parole. Vipperman's claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), because success on the claim would necessarily imply the invalidity of Vipperman's current parole status.

App. A-1 through A-4.

Subsequently, Vipperman filed a Petition for Writ of Certiorari with this Court resulting in the docketing of the instant matter. Although Vipperman identified seven issues for consideration by the Ninth Circuit Court of Appeals, herein he identifies only three issues, which are actually just a subset of Vipperman's Seventh issue presented to the Ninth Circuit Court of Appeals: "Whether the lower Federal court erred by granting the Defendant's/ Appellee's motions to dismiss." Nevertheless, Vipperman's instant petition for writ of certiorari, attempts to address

the merits of his claims, i.e. his allegedly wrongful conviction and various conspiracies relative to his incarceration and parole, as opposed to addressing the basis of the dismissal of his claims. Vipperman's instant petition fails to address the Eleventh Amendment immunity of the State and State Officials, his delay in bringing his claims resulting in the bar by the applicable statute of limitations and the applicability of *Heck v. Humphrey* in barring his civil rights claims where his underlying criminal conviction continues to stand unchallenged. As a result, Respondents herein present the instant opposition to Vipperman's petition for writ of certiorari.

STATEMENT OF FACTS

Vipperman is currently on parole pursuant to a sentence of life imprisonment, with the possibility of parole, for his 1978 conviction of second degree murder, for shooting William Parquete on April 20, 1973. ER 663. Appellant has always maintained that he is innocent and that he was framed, first by the "real" murderer, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office and by the Appellee NDOPP. ER 663. Nevertheless, on direct appeal, the Nevada Supreme Court found that the State presented its theory that "a hostile relationship existed between [Vipperman] and the victim who were partners in an auto body and used automobile business." *Vipperman v. State*, 96 Nev. 592, 593 (1980). The state showed " . . . that Vipperman wanted his money out of the business and that the victim would not give it to him . . . [that] the partnership agreement provided that in the event of the death of either party, the surviving partner would become the sole

owner of all partnership assets . . . [and] that [Vipperman] dissolved the partnership with a shotgun." *Id.*

In support of the state's theory of the case, an eyewitness testified that "he heard Vipperman threaten the victim during several telephone conversations," and then on April 20, 1973 at about 7:00 p.m., he "heard a shot and a scream" and saw "[t]he victim . . . yelling 'Frank shot me' as he held his wrist and was spinning around." *Id.* "The witness was about to help when he saw Vipperman standing nearby with a gun." *Id.* "The witness turned, the gun went off, and he crawled underneath a car before running to the building next door." *Id.* Additional evidence was presented that on the day of the homicide Vipperman purchased a shotgun. *Id.* at 594. Also, Vipperman was unable to account for his whereabouts at the relevant time of the murder. *Id.* at 593. In spite of the litigation of direct and post-conviction appeals, Vipperman has not been able to successfully challenge his conviction based upon the above facts.

LEGAL ARGUMENT

A. The Eleventh Amendment Bars this Action

Under the Eleventh Amendment a state or its agencies cannot be sued in federal court unless the state waives its immunity or Congress exercises its power under section 5 of the Fourteenth Amendment to override immunity. *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The state of Nevada has explicitly refused to waive its immunity to

suit under the Eleventh Amendment. NRS 41.031(3); *See also O'Connor*, 686 F.2d at 750. "Congress in passing section 1983, had no intention to disturb the States' Eleventh Amendment Immunity." *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999). Accordingly, as neither the State of Nevada nor NDOPP waived its immunity, the District Court and the Ninth Circuit properly concluded Respondent NDOPP was shielded from liability by its Eleventh Amendment sovereign immunity. ER 662-667, App. A-1 through A-4.

B. Concha, Compton, Jeanquart and Gates are Immune from Suit In their Official Capacity

Vipperman brought this action pursuant to 42 USC § 1983. ER 1. Neither a State, nor its officials acting in their official capacities, are "persons" under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45. Thus, State employees acting in their official capacities are immune. *Doe v. Lawrence Livermore Laboratory*, 131 F.3d 836, 839 (9th Cir. 1997). The same reasoning is applicable to 42 USC §§ 1985 and 1986. *Rode v. Dellarciprete*, 617 F.Supp. 721 (D.C. Pa. 1985); *Northern Nev. Ass'n Injured Workers v. Nevada SIIS*, 107 Nev. 108, 114, 807 P.2d 728 (1991). As a result, the District Court and the Ninth Circuit properly concluded Respondents Concha, Compton, Jeanquart and Gates could not be sued under these statutes in their official capacities. ER 737, ER 772 and App. A-1 through A-4.

Furthermore, Respondents Concha, Compton, Jeanquart and Gates cannot be sued in their official capacity in federal court unless there has been a waiver of the Eleventh Amendment by the State of Nevada. As there was not

a waiver of immunity, by the State of Nevada nor by Respondents Concha, Compton, Jeanquart and Gates, the District Court and the Ninth Circuit properly concluded that Respondents are immune from suit on these claims in their official capacities.

C. Vipperman's Claims Fail as a Matter of Law

1. Section 1983

To the extent Vipperman's complaint challenges his murder conviction, such claims are improper under 42 USC § 1983. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997). This Court has held that 42 USC § 1983 could not be used to assert allegations which would "necessarily imply the invalidity of the punishment imposed." *Edwards*, 540 U.S. at 648; *see also Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) (claim that defendants relied on false information in plaintiff's prison file to find him ineligible for parole, necessarily implicated the validity of plaintiff's continuing confinement and thus was not cognizable under section 1983).

Vipperman is also barred from challenging decisions of the parole board. *Id.* at 1024 (allegation that false information was used to find inmate ineligible for parole necessarily implicated the validity of the denial of parole, and therefore the inmate's continuing confinement). To the extent he alleges false information is contained in his parole file, such claims are tantamount to a challenge to his conviction and thus the "information" relating to his crime cannot be challenged in this action. *Butterfield*, 120 F.3d at 1024.

Additionally, § 1983 requires personal involvement for liability to attach. Liability under § 1983 only arises upon a showing of personal participation by a defendant. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *See also Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81, (9th Cir. 1984). A supervisor may be liable under § 1983 only if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995).

Vippermen did not allege any personal actions by Respondents Concha, Compton or Jeanquart and therefore cannot support a § 1983 claim against them.

Additionally, Vipperman's third claim names Respondent Gates as the individual that he "personally appeared before" and presented "hundreds of Trial Transcripts, Documents, Court Records, Police Reports, Testimonies, Scene of the Crime and Autopsy Photographs, News Paper Articles, Parole Board Hearing Transcript, and numerous other documentary evidence . . . " ER 11. Vipperman alleges Respondent Gates reviewed these materials in his presence and later informed Vipperman "over the telephone," that "he had formulated the appropriate papers and forwarded them to the 'higher ups' in Carson City, requesting the Plaintiff's request for release from parole be granted." ER 11. However, Vipperman's third claim does not allege any personal actions by Respondent Gates that could support a § 1983 claim.

2. Sections 1985 and 1986 Claims Fail as a Matter of Law

Vipperman's claims under §§ 1985 or 1986 must also fail. A claim under § 1985 must allege facts to support the allegation that defendants conspired together. *Karim-Panahi v. L.A. Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988). Vipperman references section 1985(2), however, he fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. *Karim-Panahi*, 839 F.2d at 626. Vipperman fails to allege any conspiratorial actions by Respondents Concha, Compton, Jeanquart or Gates and therefore cannot proceed under § 1985.

Section 1985(3) applies to conspiracies to violate § 1983. To state a claim for conspiracy under § 1985(3), "'a plaintiff must show . . . (1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' . . . and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment.'" *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68, 122 L.Ed.2d 34, 113 S.Ct. 753 (1993) (citations omitted). The plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights. *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1992); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1519 (9th Cir. 1987). In this case, Vipperman's complaint did not allege any class-based discrimination supporting a claim under § 1985(3).

Finally, a claim under § 1986 can be stated only if the complaint alleges a valid claim under § 1985. *Karim-Panahi*, 839 F.2d at 626. Since Appellant failed to assert a viable § 1985 claim, any § 1986 claim also must fail.

D. Vipperman's Civil Rights Claims are Barred by the Applicable Statutes of Limitations.

As pointed out by the Ninth Circuit Court in its Memorandum Decision, App. A-1 through A-4, Vipperman's first two sets of allegations challenge parole decisions made by Respondent NDOPP in 1981 and 1997. A two year statute of limitations applies to § 1983 claims in the State of Nevada. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989). Actions under § 1985 are likewise governed by the same statute of limitations that applies to § 1983 actions. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991). And finally, 42 USC § 1986 provides a one-year limit. Vipperman waited until November of 2000 to bring his instant claims. The statutes of limitations obviously have expired relative to such claims based on the allegations of NDOPP actions in 1981 and 1987.

CONCLUSION

Respondents respectfully request that the Court deny Vipperman's Petition for Writ of Certiorari; the lower courts' dismissal of Appellant's claims being based on the proper application of Eleventh Amendment Immunity, Vipperman's failure to state a claim and failure to timely bring such claims.

Dated this 23 day of October, 2003.

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